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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BALNORE CORTEZ, Defendant and Appellant.	B240670 (Los Angeles County Super. Ct. No. YA082661)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed.

David W. Scopp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Balnore Cortez, appeals his conviction for second degree burglary (Pen. Code, §§ 459, 460, subd. (a)).[1] He was sentenced to state prison for a term of three years.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Charged incident at the Torrance Home Depot.*

On October 12, 2011, Anthony Guerrera was working as a loss prevention agent at Home Depot. Guerrera usually worked at the Home Depot in Hawthorne, but that day he was working at the Home Depot in Torrance. Guerrera saw a man in the gardening department. After putting a bag of soil into his shopping cart, the man pushed the cart over to the electrical department. There he met another man and the two of them put 10 to 12 rolls of Romex wire into the cart. Each roll of wire cost $70. The bag of soil was placed on top of the wire.

The two men then separated and the first man, pushing the shopping cart, walked past the cash registers without paying and left the store. Guerrera followed him outside into the parking lot. The man turned around, saw Guerrera and started walking faster. Guerrera approached and identified himself. When Guerrera tried to detain him, the man punched Guerrera in the shoulder causing him to fall backward. The man abandoned his shopping cart and started running toward the main street. Guerrera ran after him, while calling 911, but he failed to catch the suspect.

When Torrance Police Officer Nicholas Rea responded to the call, Guerrera said he had recognized the suspect from a previous encounter with him. Guerrera told Rea the suspect's name was Balnore Cortez, and he furnished Rea with Cortez's date of birth and driver's license number.

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[1] All further references are to the Penal Code unless otherwise specified.

Six days later, Guerrera met with Torrance Police Detective Jeff Livingston. Guerrera described the suspect and said he would have no problem identifying him again. Shown a six-pack photo array, Guerrera immediately identified defendant Cortez's picture.

2. *Prior incident at the Hawthorne Home Depot.*

Guerrera testified the reason he recognized Cortez that day at the Torrance Home Depot store was because of an incident which had occurred on May 17, 2011, at the Hawthorne Home Depot store. On that occasion, Cortez entered the store and went to the plumbing department. He hid plumbing merchandise in his pockets and left the store without paying. Identifying himself, Guerrera approached Cortez and tried to detain him. But Cortez punched him in the shoulder and ran to a waiting car, which drove off. Guerrera testified he was positive the suspect in this May incident was the same person he had tried to detain in the October incident.

On July 6, 2011, Guerrera saw Cortez come into the Hawthorne Home Depot to return some paint. Recognizing him from the May incident, Guerrera stood close to him at the returns counter and, as the return was processed, he was able to see Cortez's name, date of birth and driver's license number. Guerrera called the Hawthorne Police Department to say the suspect in the May incident was in the store again. Police officers arrived, detained Cortez, and Guerrera made a positive in-field identification.

At trial, Guerrera identified Cortez as the person he had struggled with in the parking lot during the October incident at the Torrance Home Depot store.

Cortez did not present any evidence.

The jury acquitted Cortez of a robbery charge and convicted him of commercial burglary.

CONTENTION

The trial court erred by admitting evidence about the May 2011 incident at the Hawthorne Home Depot store.

DISCUSSION

Cortez contends the trial court erred by admitting evidence of the prior shoplifting incident at the Hawthorne Home Depot because it was irrelevant to any disputed issue at trial. This claim is meritless.

1. *Background.*

The prosecution made a motion to allow evidence of the Hawthorne Home Depot incident under Evidence Code, section 1101. At the hearing on this motion, the trial court said: "We had some informal discussions in chambers regarding some legal issues that are part of this case. They included a request by the People to utilize an incident involving the same loss prevention officer that occurred prior to this incident, where it's alleged that Mr. Cortez took some other copper items and exited the door of another Home Depot, used some force against the same loss prevention officer. And because of that, Mr. Cortez was recognized by this officer, who will testify in this case. And the People's position is it goes to a plan, scheme, motive, and absent [*sic*] of mistake, as well as identity, and they want to introduce it as 1101 evidence."

The trial court granted the motion and later instructed the jury it could consider the prior shoplifting incident for the following issues:

"A, Identity; the defendant was the person who committed the offenses alleged in this case; [¶] or

"B, Intent; the defendant acted with the intent to deprive the owner of the property or commit theft in this case; [¶] or

"C, Motive; the defendant had a motive to commit the offenses alleged in this case; [¶] or

"E, Accident; the defendant's alleged actions were the result of mistake or accident; [¶] or

"F. Common Plan; the defendant had a plan or scheme to commit the offenses alleged in this case."

After the jury was instructed, the following colloquy occurred outside the jury's presence:

"[Defense counsel]: Your Honor, if I may just very briefly. I know we had an informal 402 [evidentiary hearing] on the issue of the Hawthorne incident coming in. I don't believe we put on the record that there was an opposition by [the] defense, but I want the record to be clear that [the] defense was opposing and objecting to any inclusion of the Hawthorne incidents.

"The Court: Yes. And you did object to it. We discussed it informally. I overruled the objection because I felt it was sufficiently close in time, similar M.O., and it went primarily to identity, as well as the other factors, maybe not so strongly as to identity, but that's why I allowed it in."

2. *Legal principles.*

"Subdivision (a) of [Evidence Coe] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. omitted.) Subdivision (b) allows admission of evidence of a person's uncharged misconduct "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

By pleading not guilty, Cortez placed at issue all elements of the charged offenses: burglary and robbery. "The plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025." (§ 1019.) This is true even if Cortez did not actively dispute one of the requisite elements. (See *People v. Jones* (2011) 51 Cal.4th 346, 372 ["Defendant argues that only identity was actually disputed at trial, and he did not dispute the perpetrator's intent to rob . . . . Even if this is so, it is not dispositive. '[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.' "]; *People v. Steele* (2002) 27 Cal.4th 1230, 1243 ["Even if [defendant

conceded issue of intent to kill], the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent."].)

"There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

" 'On appeal, the trial court's determination of [the admissibility of other crimes evidence], being essentially a determination of relevance, is reviewed for abuse of discretion' [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.) "If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below. [Citations.] As we said in *People v. Zapien* (1993) 4 Cal.4th 929 . . . : ' "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." ' [Citation.]" (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

3. *Discussion.*

Cortez argues the trial court erred because the only possible valid use of the prior shoplifting incident would have been to show identity, which was the only actively contested issue at trial, but the two incidents were insufficiently similar to establish a distinctive modus operandi. We disagree because there were other valid uses of the disputed evidence.

Cortez is probably correct the prior shoplifting incident was not admissible to prove either a common plan or identity by means of a distinctive modus operandi.[2] The Attorney General's argument on this point is unconvincing.[3] However, the prior incident would have been relevant to prove intent. "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) Cortez was being prosecuted for shoplifting and robbery, which means the prosecution had to prove he intentionally, rather than mistakenly, left the store without paying, and that when he took the property by force or fear he intended to keep it. The prior incident tended to prove these elements.

But more importantly, the disputed evidence was admissible to corroborate Guerrera's claim he recognized Cortez during the October incident at the Torrance Home Depot because of their previous encounter in May at the Hawthorne Home Depot. That is, the prior misconduct evidence was admissible on an identity issue, although not on a modus operandi theory.

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[2] (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1271 ["Evidence going to the issue of identity must share *distinctive* common marks with the charged crime, marks that are sufficient to support an inference that the same person was involved in both instances."]; *People v. Kipp, supra,* 18 Cal.4th at p. 369 ["To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses."]; *People v. Ewoldt, supra,* 7 Cal.4th at pp. 394, 403 [while common plan or design evidence "must indicate the existence of a plan rather than a series of similar spontaneous acts, . . . the plan thus revealed need not be distinctive or unusual"; however, "[e]vidence of a common design or plan . . . is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense."].)

[3] The Attorney General argues: "Both crimes involved the theft of copper merchandise; from Home Depot stores located near each other; took place in daylight hours; and occurred in the same manner with appellant leaving the stores through the main exit without stopping to pay for the merchandise. In both crimes, when loss prevention agent Guerrera contacted appellant outside the store, appellant struck Guerrera with his fist. Appellant then fled from the scene both times."

As the Attorney General points out, the case of *People v. Beamon* (1973) 8 Cal.3d 625, is almost precisely on point. In that case, "Ashcraft, the victim . . . , parked his employer's truck for the purpose of making a delivery of liquor to a customer. The truck contained, after the delivery, merchandise worth about $2,500. When Ashcraft returned to the cab of the truck but before he started the motor defendant entered from the passenger side with a gun in his hand. Ashcraft was ordered to lie face down on the floor of the cab. Defendant took the keys from the victim's hand, started the motor and drove away. [¶] After the truck had been driven a few blocks Ashcraft looked up at the driver. Eighteen months earlier he had suffered a similar highjacking and he now recognized defendant as the person who had been tried for and acquitted of criminal charges filed in connection therewith." (*Id*. at p. 630.) Ashcraft managed to escape from the defendant and he subsequently "identified defendant by name at the time police officers arrived in response to his telephone call." (*Id*. at p. 631.)

Beamon rejected a challenge to admission of the prior highjacking evidence: "Although evidence of character is inadmissible when offered to prove specific conduct on a particular occasion, there is no prohibition against 'the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive . . . , plan, knowledge, identity . . .) other than his disposition to commit such acts.' (Evid. Code, § 1101, subd. (b).) In particular issue here is the accuracy and integrity of Ashcraft's identification of defendant. The identification, essential to the People's case, is materially buttressed by evidence that the victim was familiar with and able to recognize defendant because of observations made at a time prior to the kidnapping and robbery. *Evidence of the circumstances which made it possible for the victim to identify defendant, although it disclosed a prior highjacking, was thus relevant to establish the credibility of the identification*." (*People v. Beamon, supra,* 8 Cal.3d at p. 632, italics added.)

Cortez argues that, "even if the uncharged conduct had been admitted to bolster Guerrera's credibility, the evidence should have been limited to the fact that Guerrera had previously seen appellant since the details of the encounter are entirely irrelevant to Guerrera's ability to identify him." Not so. The evidentiary weight of Guerrera's

identification stems from the dramatic and memorable nature of his previous encounter with Cortez, a highly-charged event during which Guerrera chased Cortez and was assaulted by him. It is precisely the "details of the encounter" which affirm the accuracy of Guerrera's claim he recognized Cortez during the Torrance Home Depot incident.

This conclusion is reinforced by the fact Cortez's entire defense at trial was mistaken identity. During closing argument, defense counsel urged the jury to discount Guerrera's identification because of various evidentiary and testimonial inconsistencies. For instance, defense counsel attacked Guerrera's credibility on the following grounds: Guerrera told the 911 operator there were two Hispanic men who had hit him and he was trying to apprehend them, whereas he only chased one suspect into the parking lot; Guerrera's description of the suspect's clothing was inconsistent with surveillance camera footage that partially captured the parking lot events; Guerrera claimed to have seen a tattoo of red lips on Cortez's neck when he stood close to him at the returns counter but, at trial, Cortez did not have any tattoos on his neck or any scarring to indicate a tattoo had been removed. This attack on the integrity of Guerrera's eyewitness identification demonstrates the importance of the prior misconduct evidence.

We also conclude the evidence was not more prejudicial than probative under Evidence Code section 352, which provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The " ' "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual . . . .' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Here, the Hawthorne Home Depot incident was extremely probative, particularly given Cortez's attack on Guerrera's credibility, but the facts of the incident were no more inflammatory than the Torrance Home Depot facts, and this served to "decrease[] the potential for prejudice." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 405)

We conclude the trial court did not abuse its discretion by admitting the evidence of Cortez's prior shoplifting at the Hawthorne Home Depot.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.